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# Annual Survey of Virginia Law - Civil Procedure and Practice

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## CIVIL PROCEDURE AND PRACTICE

W. Hamilton Bryson\*

### I. DISMISSALS AND NONSUITS

Rules 2:4<sup>1</sup> and 3:3(c) of the Rules of Virginia Supreme Court ("Rules of Court")<sup>2</sup> require the dismissal of an action if service of process is not accomplished within one year after the filing thereof unless the plaintiff can show "due diligence" or good cause for the delay.<sup>3</sup> Since the plaintiff can get personal service on a defendant who has absconded by means of the general long arm statute,<sup>4</sup> it will be a heavy burden in practice to show due diligence or good cause or it will be a highly unusual situation. Recently, two issues have arisen regarding these rules.

The first issue is whether the dismissal is with prejudice. It can be argued that, since service of process can be had by the general long arm statute, the delay of a year in effectuating service of process itself shows the lack of a good faith effort by the plaintiff to have the defendant served.<sup>5</sup> If the plaintiff has not acted in good faith, the case should be dismissed with prejudice. If the cause is not dismissed forever, the plaintiff can refile on the same day as the dismissal, and the statute of limitations period will be tolled as of the first filing.<sup>6</sup> This process can be repeated indefinitely to the total frustration of the statutes of limitations and the beneficial policies thereof.<sup>7</sup>

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1. VA. S. CT. R. 2:4.

2. VA. S. CT. R. 3:3(c).

3. Applied in *Campbell v. Vaughan*, 10 Va. Cir. 154 (1987); *Rosenquist v. Rosenquist*, 10 Va. Cir. 51 (1986); *Lorcom House Condo. v. Wells*, 3 Va. Cir. 226 (1984), *aff'd in part, rev'd in part*, 237 Va. 247, 377 S.E.2d 381 (1989); *Stark v. Johnstone*, 2 Va. Cir. 476 (1979); *Christian v. Hautz*, 6 Va. Cir. 486 (1972); *Clark v. Long*, 3 Va. Cir. 422 (1971).

4. VA. CODE ANN. §§ 8.01-328:1, -329(A)(1) (Cum. Supp. 1989).

5. If the plaintiff shows that he has been diligent and is in good faith, the case should not be dismissed at all.

6. VA. CODE ANN. § 8.01-229(E)(1) (Cum. Supp. 1989).

7. W. H. BRYSON, *HANDBOOK ON VIRGINIA CIVIL PROCEDURE* 99-100 (2d ed. 1989).

The other position was held by Judge Robert K. Woltz in the case of *Campbell v. Vaughan*.<sup>8</sup> In this case, as the dismissal was not on the merits, it was ordered to be not with prejudice. The statutes also appear to call for a dismissal without prejudice. Section 8.01-229(E)(1) of the Code of Virginia ("Code")<sup>9</sup> states in part that "if any action . . . is dismissed without determining the merits . . . another action may be brought . . . ."<sup>10</sup>

However, if a dismissal under Rule 3:3(c)<sup>11</sup> or Rule 2:4<sup>12</sup> is considered to be quasi-penal, it could be with prejudice though not on the merits. Rule 4:12(b)(2)(C)<sup>13</sup> provides for such a result for the failure to cooperate with discovery requests.<sup>14</sup> If the dismissal is quasi-penal, then it would seem that the Rules of Court will not be trumped by the statute.<sup>15</sup>

The timely service of process has been held to be "jurisdictional" and to be a requirement that cannot be deemed waived by a general appearance on the part of the defendant.<sup>16</sup> It is submitted that this position goes too far. If the Rule allows the plaintiff to excuse the failure to effectuate service, then it cannot be a matter of jurisdiction. If a general appearance cures the failure to serve process,<sup>17</sup> then it should cure late service also.

Although an action must be filed against an uninsured or underinsured motorist within the period of the statute of limitation, there is no requirement of service of process upon the uninsured motorist carrier within any set time. "[A] plaintiff in a personal injury case may not discover that the tortfeasor is uninsured or underinsured (as in this case) until after the tortfeasor has been served with process, which may occur at a time after the statute of limitations has run."<sup>18</sup>

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8. 14 Va. Cir. 23 (1988). This opinion had not come to the author's attention until after his handbook, see BRYSON, *supra* note 7, had gone to the press.

9. VA. CODE ANN. § 8.01-229(E)(1) (Cum. Supp. 1989).

10. *Id.*; see also Strickland v. Simpkins, 221 Va. 730, 735, 273 S.E.2d 539, 541 (1981).

11. VA. S. Ct. R. 2:4.

12. *Id.* at 3:3(c).

13. *Id.* at 4:12(b)(2)(C).

14. *Cf.* Nuchols v. Marshall, 2 Va. Cir. 454 (1977) (case does not cite Rule 4:12(b)(2)(C); however, it does deal with an order to dismiss a case for failure to cooperate with discovery requests as having res judicata effect).

15. See VA. CONST. art. VI, § 5; VA. CODE ANN. § 8.01-3(D) (Repl. Vol. 1984).

16. Marshall v. McDaniel, 9 Va. Cir. 369, 378 (1974).

17. *E.g.*, Nixon v. Rowland, 192 Va. 47, 63 S.E.2d 757 (1951).

18. Glens Falls Ins. Co. v. Stephenson, 235 Va. 420, 423, 367 S.E.2d 722, 724 (1988).

The second issue is whether a plaintiff who has not obtained service of process on the defendant within one year of filing can take a nonsuit after the year has passed. It has been ruled that unless the court finds that the plaintiff has exercised due diligence and still has failed to get service, no judgment can be entered in that or any subsequent action based on that cause of action.<sup>19</sup> This reasoning would solve the problem of the first issue if it did not raise problems of its own.

In opposition to this position, it has been ruled that a plaintiff has an absolute right to one nonsuit for each cause of action.<sup>20</sup> The essence of a nonsuit is the voluntary withdrawal of an action without prejudice to future litigation of the cause of action. Moreover, Rule 2:4<sup>21</sup> and Rule 3:3<sup>22</sup> speak of "the action," and after a nonsuit, the plaintiff brings a new and different action though it is based on the same cause of action.<sup>23</sup>

A plaintiff may nonsuit an action before it is dismissed, and he may recommence as permitted by section 8.01-229(E)(3) of the Code.<sup>24</sup> This can be done only once.<sup>25</sup> However, when the action is dismissed under Rule 2:4<sup>26</sup> or Rule 3:3,<sup>27</sup> it should be dismissed with prejudice in order to preserve the integrity of the statutes of limitations.

The common law rule was that a nonsuit could be taken at any time before the jury returned its verdict. The current statute allows a nonsuit only before the jury retires to deliberate or a motion to strike has been sustained or the case is submitted to the judge for judgment.<sup>28</sup> Thus, where a verdict has been set aside for errors of law in the instructions, it is too late thereafter to take a non-

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19. See *English v. Otis Elevator Co.*, 16 Va. Cir. \_\_\_ (1989); *Clark v. Murphy*, 13 Va. Cir. 347 (1988) (nonsuit not allowed); *Shepelak v. Pascuzzi*, 13 Va. Cir. 285 (1988); *Williams v. Weakley*, 14 Va. Cir. 70 (1988).

20. *Nash v. Jewell*, 227 Va. 230, 315 S.E.2d 825 (1984); see also VA. CODE ANN. § 8.01-380(B) (Repl. Vol. 1984).

21. VA. S. CT. R. 2:4.

22. *Id.* at 3:3.

23. See *McElhone v. Gale*, 14 Va. Cir. 268 (1989); *Collier v. Kirkby*, 14 Va. Cir. 303 (1989); *Moore v. Boswell*, 10 Va. Cir. 343 (1988).

24. VA. CODE ANN. § 8.01-229(E)(3) (Cum. Supp. 1989).

25. *Id.* § 8.01-380 (Repl. Vol. 1984) (absolute right of the plaintiff); see *Nash v. Jewell*, 227 Va. 230, 315 S.E.2d 825 (1984); *Collier v. Kirkby*, 14 Va. Cir. 303 (1989).

26. VA. S. CT. R. 2:4.

27. *Id.* at 3:3.

28. VA. CODE ANN. § 8.01-380(A) (Repl. Vol. 1984).

suit.<sup>29</sup> In addition, a nonsuit comes too late when a case has already been dismissed for failure to serve process.<sup>30</sup> Further, after the trial judge has ruled that he will grant summary judgment, a nonsuit comes too late even though the draft order has not yet been submitted and entered.<sup>31</sup>

When a case has been submitted to the court for rulings on a demurrer based on the failure to state a claim, a plea of the statute of limitations, and a motion to dismiss the case, it has been submitted to the court for a decision on the merits and a nonsuit thereafter comes too late.<sup>32</sup> However, where both parties have made their oral arguments upon a motion for summary judgment and the judge gives leave to file written memoranda before a certain day, the case is not submitted to the judge for the purposes of the nonsuit statute until all memoranda have been filed or the time limit expires.<sup>33</sup>

Where a plaintiff files a second action for the same cause of action in a different circuit court and then nonsuits the first, the second action will be dismissed because it was the same cause of action and not filed in the same forum as the first.<sup>34</sup> Also, where a second action is filed after the nonsuiting of an action that was appealed from the general district court, the statutory jurisdictional limitations on the district court govern the ad damnum of the second action.<sup>35</sup> Thus, the new action is seen to be a continuation of the first action even though it was refiled and given a new docket number and new process was served on the defendant. A plaintiff is estopped by his original suit in the district court to claim later that he was damaged more than \$7,000.00.<sup>36</sup>

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29. *Moyer v. A. E. Prinkey & Son, Inc.*, 14 Va. Cir. 56 (1988).

30. *Campbell v. Vaughan*, 14 Va. Cir. 23 (1988).

31. *Khanna v. Dominion Bank*, 237 Va. 242, 377 S.E.2d 378 (1989).

32. *Wells v. Lorcom House Condo. Council*, 237 Va. 247, 377 S.E.2d 381 (1989).

33. *City of Hopewell v. Cogar*, 237 Va. 264, 377 S.E.2d 385 (1989).

34. See *Moore v. Gillis*, 14 Va. Cir. 219 (1988) (construing VA. CODE ANN. § 8.01-380(A) (Repl. Vol. 1984)).

35. See *Waller v. Anthony*, 16 Va. Cir. \_\_\_\_ (1989). *But cf.* *White v. Southland Corp.*, 3 Va. Cir. 97, 98 (1983) (where plaintiff takes nonsuit in general district court and refiles for damages in excess of statutory jurisdictional limits, he can refile in circuit court if he does so within six months).

36. VA. CODE ANN. § 16.1-77 (Repl. Vol. 1988).

## II. FAULTY SERVICE OF PROCESS

There seems to be an increasing amount of attempted service of process by improper methods. Process is being mailed to defendants. While this may be permitted in federal practice,<sup>37</sup> there is no provision for service through the mail in Virginia practice, except for service on the Secretary of the Commonwealth acting as a defendant's statutory agent.<sup>38</sup> Also, process is being served by employees of the plaintiff's attorney. This is in contravention of section 8.01-293(2) of the Code,<sup>39</sup> inasmuch as service is being attempted by a person who is "interested in the subject matter in controversy."<sup>40</sup>

It has been suggested that the curing statute<sup>41</sup> repairs the improper service of process, in that the writs of process were actually received by the defendants. Even though the statute contains the words "shall be sufficient,"<sup>42</sup> it is the opinion of this writer that the curing statute only applies to good faith efforts to serve process according to the various statutory requirements. If there is no good faith requirement in the curing statute, then this statute could be used effectively to nullify all of the other sections of Chapter Eight of the Code. It would frustrate the policy of fair notice as expressed by the General Assembly in the various statutes regulating service of process.

It has been ruled that personal service of process upon a defendant by a sheriff is void where the defendant was fraudulently lured into Virginia for the purpose of effectuating service of process.<sup>43</sup> If the curing statute does not operate in such a situation where all of the statutory requirements have been met, it is suggested that a fortiori it should not cure service of process where, through bad faith, the statutory requirements have not been met. The curing statute should not permit a fraud on the law, and a deliberate scoffing at the rules of service of process should result in invalid jurisdiction.

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37. FED. R. CIV. P. 4(c)(2)(C)(ii).

38. VA. CODE ANN. § 8.01-329(B) (Cum. Supp. 1989).

39. *Id.* § 8.01-293(2).

40. *Id.*

41. *Id.* § 8.01-288.

42. *Id.*

43. *See Wheeler v. Flintoff*, 156 Va. 923, 933, 159 S.E. 112, 115 (1931); *Abel v. Smith*, 151 Va. 568, 574-77, 144 S.E. 616, 618-19 (1928); *Lines v. Lines*, 3 Va. Cir. 111, 112 (1983).

## III. SANCTIONS UNDER SECTION 8.01-271.1 OF THE CODE

In 1987, the General Assembly enacted a statute which requires attorneys and parties not represented by counsel to certify to the court that all pleadings and motions are made in good faith and not for any improper purpose.<sup>44</sup> This statute, which follows Rule 11 of the Federal Rules of Civil Procedure,<sup>45</sup> also requires the judge, if he finds a violation, to impose appropriate sanctions including reasonable attorneys' fees upon the offending lawyer or party or both.<sup>46</sup> This statute goes considerably beyond the Rules of Court.<sup>47</sup> It also goes beyond federal Rule 11, in that it expressly includes oral motions. The statute applies in both district and circuit courts.<sup>48</sup> In 1989, the General Assembly extended these sanctions to the bad faith filing of attachments and memoranda of lis pendens.<sup>49</sup>

There has been much discussion recently, among the bench and bar, as to the use of sanctions under section 8.01-271.1 of the Code<sup>50</sup> for improper pleading and practice.<sup>51</sup> So far, such sanctions have been imposed only rarely and with considerable caution in Virginia state practice. Only a few formal judicial opinions have been reported, though this section of the Code has been in force for two years.

In *Parr Excellence, Inc. v. Anderson*,<sup>52</sup> the court found that a motion to disqualify opposing counsel was not well grounded in fact, not warranted in law and was made for improper purposes. The court then found "that the motion was interposed for the purposes of delay, harassment, frustration and escalation of costs of the opposition."<sup>53</sup> Sanctions were imposed upon the *pro se* defendant.

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44. VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 1989).

45. FED. R. CIV. P. 11.

46. VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 1989).

47. VA. S. CT. R. 1:4(a).

48. VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 1989).

49. *Id.* § 8.01-269.

50. *Id.* § 8.01-271.1.

51. See, e.g., R. Page, III, & S. Holleran, The Impact of Rule 11 and Its Virginia Counterpart on Civil Litigation (Jan. 21, 1989) (The Virginia Bar Association—Civil Litigation Committee); Richardson, *Bench, Bar Slow to Utilize State's Version of Rule 11*, 3 Va. Law. Weekly 937, 940 (Apr. 17, 1989).

52. 14 Va. Cir. 10 (1987).

53. *Id.* at 14.

In *Dominion Leasing Corp. v. Thompson*,<sup>54</sup> sanctions were imposed for the filing of outrageous pleadings filed for the purposes of vexation and harassment. The claim pleaded was clearly barred by the doctrine of res judicata. The arguments supporting the claim were characterized by the judge as "deceitful."<sup>55</sup> Furthermore, a federal court had already imposed sanctions under Rule 11<sup>56</sup> against the same party for filing the same claim in that court. In that the same claim dismissed in the federal court had also been later dismissed by the Superior Court of the District of Columbia, the Circuit Court of the City of Roanoke found sanctions to be appropriate.<sup>57</sup>

R. Page and S. Holleran note that lawyers are beginning to seek sanctions for abusive practices:

In *Holding v. Duling*, Law No. 2055-1 (Cir. Ct. City of Richmond, Dec. 16, 1987), Judge Murphey, sitting by designation, imposed sanctions against a *pro se* [plaintiff] for filing an action that was frivolous and clearly designed to harass the defendants. In *Stanley v. Birkbeck*, Law No. 12088-FB (Cir. Ct. City of Newport News, July 6, 1988), the Circuit Court imposed sanctions against the plaintiff and the plaintiff's counsel for violating § 8.01-271.1 during discovery. Judge Bateman imposed sanctions against the plaintiff and her attorney for giving materially false information at the plaintiff's deposition and in answers to interrogatories propounded by the defendant. Pursuant to § 8.01-271.1, the defendant sought attorney's fees and costs incurred in attempting to verify the plaintiff's interrogatory responses and in preparing the motion for sanctions. The defendant also sought an order dismissing the case with prejudice. While the court declined to dismiss the case, the court awarded sanctions jointly and severally against the plaintiff and her attorney in the amount of \$1,627.00.<sup>58</sup>

Although many members of the bar have expressed sincere reservations, fearing a deleterious effect of section 8.01-271.1 of the Code<sup>59</sup> on the collegiality of the practice of law in the state courts, it is clear to this writer that such a remedy is occasionally needed. The cases just mentioned demonstrate it most amply.

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54. 15 Va. Cir. 446 (1989).

55. *Id.* at 447.

56. FED. R. CIV. P. 11.

57. *Dominion*, 15 Va. Cir. at 447-48.

58. Page & Holleran, *supra* note 51, at 24-25.

59. VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 1989).



Who should pay for the bad faith use of the courts of justice? If a plaintiff pleads a sham claim or the defendant files a frivolous demurrer, counsel must prepare memoranda of points and authorities and appear at a special hearing to argue the point. This will involve considerable expense to all parties to the litigation. It has been suggested that this is simply part of the normal operation of the system of justice. It appears to this writer, however, that one is not serving one's client if one acquiesces in the bad faith of the opposite party or his counsel by passing on the cost of opposing bad faith motions to one's own client. An attorney should either not charge his client for opposing a bad faith motion or move the court for compensatory sanctions under section 8.01-271.1 of the Code.<sup>60</sup>

This will significantly reduce the cost of litigation. This will be equally effective for plaintiffs and defendants. The reduction of the expense of litigation is certainly good public policy in that it increases accessibility to the courts.

The Virginia state courts have been cautious and conservative in their use of financial sanctions, refusing them in cases of good faith error. In *Berger v Simsarian*,<sup>61</sup> the court refused to grant sanctions for the bringing of a non-meritorious lawsuit because the *pro se* plaintiff's medical or psychological condition made it inappropriate. In *Tullidge v. Augusta County Supervisors*,<sup>62</sup> the court held that a private reprimand was an appropriate sanction for a sincere but unreasonable lawsuit. (It is the opinion of this writer that, if the pleading was sincere and in good faith, then no sanction is required by the statute. Otherwise this statute would always place the costs of the prevailing party's counsel upon the losing party, as is the English practice. This was not the intent of the legislature.)

These circuit court opinions, on the subject of sanctions, show that the Virginia courts are applying a subjective test. They are applying sanctions only in instances of gross bad faith.<sup>63</sup>

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60. *Id.*

61. 14 Va. Cir. 261 (1989).

62. 15 Va. Cir. 134 (1988).

63. See also *Lee Conner Realty Corp. v. Lannon*, 9 Va. Cir. 97 (1987), (which was decided before the effective date of VA. CODE ANN. § 8.01-271.1).

## IV. SOME MISCELLANEOUS NEW STATUTES

Numerous minor amendments to Virginia statutes were enacted recently by the General Assembly. This section, however, will note only a few of the more significant legislative changes in the law relating to civil practice and procedure.

The right to trial by jury is now provided for in actions under the Virginia Tort Claims Act.<sup>64</sup> This 1989 amendment to the code reverses the opinions in *Wenker v. Commonwealth*,<sup>65</sup> and *Kitchen v. Department of Highways*.<sup>66</sup>

The venue requirements for suits for divorce or annulment of marriage have been taken out of section 20-96 of the Code<sup>67</sup> and reenacted in section 8.01-261 as a new subsection 19.<sup>68</sup> This did not change the designation of which courts can hear such suits. The purpose of the reenactment in a different section of the Code was to have venue mandatory but not jurisdictional. Formerly, venue was jurisdictional because divorce is purely a creation of statutory law and was not part of the common law. Since the statute that created the right also designated the forum in which the right is to be decided, venue was jurisdictional.<sup>69</sup> Now, incorrect venue can be waived by the defendant voluntarily or through inaction,<sup>70</sup> and the divorce decree will not be rendered a nullity thereby. In addition, the general forum non conveniens statute<sup>71</sup> now applies to these types of cases.

In 1989, a new section 8.01-420.4 of the Code<sup>72</sup> was enacted to regulate the place of the taking of depositions. It reads as follows:

Depositions shall be taken in the county or city in which suit is pending or in an adjacent county or city; except that depositions may be taken at a place upon which the parties agree or at a place that the court in such suit may, for good cause, designate.<sup>73</sup>

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64. VA. CODE ANN. § 8.01-195.4 (Cum. Supp. 1989).

65. 13 Va. Cir. 294 (1988).

66. 9 Va. Cir. 220 (1987).

67. VA. CODE ANN. § 20-96 (Cum. Supp. 1989).

68. *Id.* § 8.01-261.

69. BRYSON, *supra* note 7, at 138-39.

70. VA. CODE ANN. § 8.01-258 (Repl. Vol. 1984); *id.* § 8.01-264 (Cum. Supp. 1989).

71. *Id.* § 8.01-265 (Repl. Vol. 1984).

72. *Id.* § 8.01-420.4 (Cum. Supp. 1989).

73. *Id.*

The former practice was for the requesting party to designate in the subpoena the place for the examination. As a matter of practice, the place chosen was most frequently the requesting party's attorney's office or a place suggested by the deponent.

The federal rule on the same subject,<sup>74</sup> which was last substantially amended in 1985, reads as follows:

A person to whom a subpoena for the taking of a deposition is directed may be required to attend at any place within 100 miles from the place where that person resides, is employed or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court.<sup>75</sup>

These two provisions are opposite to each other in focus. The Virginia statute looks to the venue in which the action is pending. The choice of forum is made by the plaintiff to suit his own convenience, but the choice is limited by the venue statutes, which are designed to assure that the convenience of the defendant is reasonably respected. While the convenience of nonparty witnesses may be served in the process, it is only a matter of coincidence. The federal rule is focused on the convenience of the deponent. It is to be noted that neither the Virginia statute nor the federal rule draws a distinction between parties and nonparty deponents.

It appears to this writer that the Virginia statute is basically inconsiderate to nonparty deponents and operates for the general benefit of plaintiffs and their attorneys, who selected the forum in the first place. A nonparty witness can be subpoenaed to attend and testify at the other end of the state. Although mileage and tolls are reimbursable,<sup>76</sup> the major expense, time lost from work, is not. Hence, another opportunity to harass the other party's witnesses has been codified by this new statute.

The effect of the new statute will be substantially mitigated by the provisions allowing the parties to agree among themselves on a place for taking the deposition that is convenient to the deponent. The attorneys acting in good faith will balance the expense of their going to the locality where the deponent resides or works against the possible lack of cooperation of a disgruntled witness who has

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74. FED. R. CIV. P. 45(d)(2).

75. *Id.*

76. VA. CODE ANN. § 14.1-190 (Repl. Vol. 1985).

been forced to come to them. In cases of bad faith and lack of professional courtesy, a party or a witness may get a court order designating a more fair and convenient place for the taking of the deposition.<sup>77</sup>

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77. *See also* VA. S. CT. R. 4:1(c) (protective orders).

